SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor's Office
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Prosecution response to 'Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor's Bar Table Motion'

with public Annex 1

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Appeal by the VESELI and KRASNIQI Defence (collectively, 'Defence')[1] against the Trial Panel's Decision[2] concerning the admission of documents seized from the residences of the Accused SELIMI and KRASNIQI. The Appeal fails to demonstrate any error in the Trial Panel's interpretation of the inventory requirement in Rule 39(4),[3] let alone one that could invalidate the Decision.

II. SUBMISSIONS

A. THE TRIAL PANEL CORRECTLY INTERPRETED RULE 39(4)

2. The Defence misrepresents the Decision by claiming that the Trial Panel's interpretation circumvented the plain meaning of Rule 39(4).[4] Rather, the Trial Panel correctly and logically found that – like other statutory provisions relating to the collection and admissibility of evidence[5] – Rule 39(4)'s terms should be interpreted and applied in the concrete circumstances of the case:[6]

> While Rule 39(4) requires the inventory to record each "item seized", this requirement is to be interpreted in light of what is being seized in a given case, the quantity, state

[1] Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/IA029/F00002, 27 July 2023, Confidential ('Appeal').
[2] Second Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/F01596, 9 June 2023, Confidential, paras 110, 113 ('Decision'). These paragraphs alone concern the interpretation of Rule 95(4). The certified issue is limited to the Panel's interpretation of the provision; the Panel refused to certify for appeal an issue challenging its application thereof and related findings concerning compliance. *See* Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/F01678, 17 July 2023, Confidential ('Certification Decision'), paras 5 (defining both the certified and denied issues), 28.
[3] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[4] Appeal, KSC-BC-2020-06/IA029/F00002, para.28; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, ('Gucati 9 December Decision'), para.49.
[5] Judgment on the Referral of Revised Rules of the Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-03/F00006, 28 June 2017, para.81; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998 ('*Delalić* Decision'), para.17.
[6] Decision, KSC-BC-2020-06/F01596, para.113.

> and condition of the material when seized. Documents are to be recorded in the inventory as they are found at the location of the search. If they are found as a bundle or collection of documents, their description as such would meet the requirement of itemization foreseen by Rule 39(4).

3. In this respect, established principles of interpretation include not only a provision's language, but the context in which a provision is placed within the Law[7] or Rules,[8] as well as its object and purpose.[9]

4. The object and purpose of the inventory requirement is, *inter alia*, to safeguard (i) privacy rights, including the necessity and proportionality of any search and seizure, and (ii) the integrity of seized evidence.[10] The Trial Panel's interpretation achieves that object and purpose. In this respect, practical limitations arising from the scope or nature of the seized materials are relevant considerations when assessing the appropriate safeguards and the manner in which they are applied.[11] As found by the Trial Panel, certain descriptions in a contemporaneous inventory may therefore generally – yet accurately – describe collections and types of documents due to, *inter alia*, the nature of the materials seized and related circumstances. In any event, in this case, the inventory also included the location where the items were found and a corresponding number assigned to each sealed evidence bag.[12] With such information, it is possible to verify what evidence was seized from a given location.

5. Thus, the Trial Panel's interpretation of Rule 39(4) is consistent with its plain language, object, and purpose. The Trial Panel correctly concluded that the Defence requests a level of inventory specificity not required by the Rules.[13]

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[7] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').
[8] Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05-L-053 on SC and SPO, KSC-CC-PR-17-01/F00004, 26 April 2017, para.14.
[9] Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", KSC-BC-2020-06/IA009/F00030, 23 December 2021, para.139.
[10] *Specialist Prosecutor v. Gucati and Haradinaj,* Public Redacted Version of the Trial Judgment, KS-BC-2020-07, F00611/RED, 18 May 2022 ('*Gucati and Haradinaj* Judgment'), para.327.
[11] ECtHR, *Wolland v. Norway*, 39731/12, Judgment, 17 May 2018, para.80 (considering, *inter alia*, the scope of the documents and the fact that applicant had access to such documents, when assessing whether the manner in which a search and seizure was carried out was unlawful).
[12] *See* Appeal, KSC-BC-2020-06/IA029/F00002, Annex 1.
[13] Decision, KSC-BC-2020-06/F01596, para.110.

B. THERE ARE AMPLE SAFEGUARDS

6. Rule 39(4) does not exist in a vacuum and must be considered in light of other available safeguards, which serve the same or similar purposes. Indeed, even in the absence of an inventory, the presence of suspects, observers, and counsel during a search, the sealing of the seized evidence, the production of reports, and the opportunity for review have been found to be sufficient safeguards.[14]

7. In this case, in addition to the contemporaneous inventories that were prepared and consistent with, *inter alia*, Rules 37 and 39 and the terms of the Search and Seizure Orders:[15]

a. The Accused SELIMI and KRASNIQI (who was present at one of the search locations) were notified of the search and seizure operations, which were thereafter carried out in the presence of designated representatives, counsel, and independent observers.[16]

b. During the searches, seized evidence was placed in separate evidence bags (each had a unique number) and sealed.[17]

c. Objections and comments by the independent observers and the Accused's counsel and designated representatives were recorded in the

[14] ECtHR, *Man et al. v. Romania*, 39273/07, Decision, 19 November 2019, paras 55, 74 (arguing, *inter alia*, that no detailed inventory was drawn up), 94 (noting that the searches were carried out in the presence of the applicants, two attesting witnesses and defence counsel, the seized items were placed in sealed envelopes, search reports were drafted and no objections to the search were made by the applicants), 95 (noting that the applicants had a remedy in the form of an ex post facto judicial review claim in respect of the manner in which the search orders had been executed). *See also* ECtHR, *Van Rossem v. Belgium*, 41872/98, Judgment, 9 December 2004, para.50 (in the absence of other safeguards, for example, where the applicant was not informed of or present at a search, an inventory may be essential).

[15] Corrected Version of Decision Authorising Seach and Seizure, KSC-BC-2020-06/F00031/COR, 26 October 2020; Decision Authorising Seach and Seizure, KSC-BC-2020-06/F00030, 26 October 2020 (collectively, 'Search and Seizure Orders').

[16] Prosecution report on search and seizure pursuant to KSC-BC-2020-06/F00031/COR with strictly confidential and *ex parte* Annexes 1-4, KSC-BC-2020-06/F00095, 19 November 2020 ('Krasniqi Search Report'); Prosecution report on search and seizure pursuant to KSC-BC-2020-06/F00030 with strictly confidential and *ex parte* Annexes 1-4, KSC-BC-2020-06/F00100, 23 November 2020, ('Selimi Search Report'); Decision, KSC-BC-2020-06/F01596, para.118.

[17] Decision, KSC-BC-2020-06/F01596, para.114.

search report, including on the inventory. No objection was raised as to the detail of the descriptions.[18]

d. At the pre-trial stage, the SPO provided inventories with further detail to assist the Defence.[19]

e. Following review, the SPO returned those seized items that were no longer deemed relevant for the purposes for which they were obtained.[20] Those retained were, as appropriate, noticed and/or disclosed pursuant to Rules 102 and 103.

8. In cases with similar – and indeed, fewer – safeguards, the ECtHR has found that the absence of an inventory does not render a search and seizure unlawful.[21] Cases cited by the Defence in support of the Appeal primarily concern restrictions on legal assistance during police questioning.[22] The Court found that even in those situations, restrictions 'must be based on an individual assessment of the particular circumstances of the case'.[23] Such an individualised assessment underlies the Decision.

9. Accordingly, whether considered on its own or in light of all available safeguards, an inventory consistent with the Trial Panel's interpretation of Rule 39(4) – namely, which describes seized items 'in light of what is being seized in a given case,

[18] Krasniqi Search Report, KSC-BC-2020-06/F00095; Selimi Search Report, KSC-BC-2020-06/F00100. *See also* Decision, KSC-BC-2020-06/F01596, para.106.
[19] Prosecution submission of seized item indexes with confidential and *ex parte*, Krasniqi Defence only, Annex 1 and confidential and *ex parte*, Selimi Defence only, Annex 2, KSC-BC-2020-06/F00366, 23 June 2021, Confidential.
[20] Rule 33.
[21] ECtHR, *Chappell v. UK*, 10461/83, Judgment, 30 March 1989, paras 53(e) (the applicant relied on the fact that an inventory of seized items had not been prepared), 62 (the court found that, *inter alia*, the lack of an inventory was not of 'sufficient weight to warrant a finding of disproportionality'); ECtHR, *Erduran et al. v. Turkey*, 25707/05 and 28614/06, Judgment, 20 November 2018, paras 94-95 (finding no error in a procedure where – if it is not possible earlier – an inventory is prepared after unsealing the evidence bags, rather than at the time of the search and seizure operations; considering in this regard, the applicant's ability to request and access related information, as well as its failure to avail itself of these opportunities); ECtHR, *Raiffeissenbank Kötschach-Mauthen v. Austria*, 28630/95, Decision, 3 December 1997, p.5 (finding no violation where the domestic court considered that procedural irregularities, which do not comply with applicable provisions, were not sufficient on their own to demonstrate that a search and seizure was unlawful).
[22] Appeal, KSC-BC-2020-06/IA029/F00002, para.43, *citing, inter alia*, ECtHR, *Ibrahim and Others v. the United Kingdom*, no.50541/08, Judgment, 13 September 2016, paras 256-258.
[23] ECtHR, *Ibrahim and Others v. the United Kingdom*, no.50541/08, Judgment, 13 September 2016, para.258.

the quantity, state and condition of the material when seized' – is an effective means of ensuring the lawfulness of the search and integrity of the evidence.[24]

C. THE APPEAL FAILS TO ESTABLISH ANY MATERIAL IMPACT ON THE DECISION

10. Considering the stage of the proceedings and that the Defence did not challenge the lawfulness of the search and seizure operations previously,[25] any alleged infringement of Rule 39(4) can only be relevant to this Appeal insofar as it amounts to a bar to admission of evidence under Rule 138(2). This provision is limited to circumstances where:

a) the violation casts substantial doubt on the reliability of the evidence; or
b) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

11. The Appeal fails to address either of these criteria beyond a mere assertion that 'a new determination pursuant to Rule 138(2) is required'.[26] This unsubstantiated assertion fails to discharge the Defence's appellate burden to explain how the alleged error invalidates the Decision.[27] The Court of Appeals has repeatedly emphasised that 'an alleged error of law which has no prospect of changing the outcome of the decision may be rejected on that basis'.[28]

12. While the Defence complains generally that the inventory provided to KRASNIQI included 'unsubstantiated and generic descriptions such as "documents", "binders", "photos", and "documents in binders"', the Defence fails to link these alleged issues to any of the items that are the subject of the Decision.[29] Indeed, the Trial

[24] *Contra* Appeal, KSC-BC-2020-06/IA029/F00002, paras 33-44.
[25] Decision, KSC-BC-2020-06/F01596, para.106.
[26] Appeal, KSC-BC-2020-06/IA029/F00002, para.47.
[27] *Gucati and Haradinaj* Appeal Judgment, KSC-CA-2022-01/F00114, para.22.
[28] *Gucati and Haradinaj* Appeal Judgment, KSC-CA-2022-01/F00114, para.22; Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA004/F00005, para.32; Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA010/F00008, para.29; Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011, para.22. *See also* Gucati 9 December Decision, KSCS-BC-2020-7/IA001/F00005, para.12.
[29] Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table with confidential Annexes 1-8, KSC-BC-2020-06/F01387, 21 March 2023, para.36.

Panel noted in the Certification Decision that the Defence does not (i) dispute that the documents which the SPO has tendered were seized from the Accused's residences or (ii) claim that the searches exceeded the scope of the relevant orders.[30]

13. Moreover, the Defence's submissions are replete with misrepresentations and speculation. For instance, the submission that the SPO cannot establish the provenance of the items because of the 'absence of the Rule 39(4) contemporaneous list' is patently false because: (i) a contemporaneous list was produced; and (ii) that list contains information other than the description of the items, such as the location where the item was found and the evidence number.[31]

14. The Defence misleadingly cites a decision of the Pre-Trial Judge in support of the submission that 'the lack of an itemised description for each document seized impedes the Defence's ability to verify whether the items later tendered for admission were effectively retrieved during the search and seizure'.[32] Although the Pre-Trial Judge ordered the SPO to submit a more detailed inventory of documents seized, he did so primarily because at that stage, when the documents had not yet been disclosed, the Defence's ability to understand which documents had been seized was impeded; this, in turn, affected the Accused's ability to 'check that the search was limited to the scope of [the] search warrant and raise any possible issues'.[33] At this stage, the Defence has received two versions of the relevant inventories, as well as the seized items themselves, along with relevant metadata.[34] It therefore has the information it requires.

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[30] Certification Decision, KSC-BC-2020-06/F01678, para.24.
[31] Appeal, KSC-BC-2020-06/IA029/F00002, para.37.
[32] Appeal, KSC-BC-2020-06/IA029/F00002, para.37 (emphasis omitted), *citing* Decision on the Request of the Veseli Defence Regarding Documents Seized During the Search, KSC-BC-2020-06/F00251, 16 April 2021, Confidential, para.15.
[33] Decision on the Request of the Veseli Defence Regarding Documents Seized During the Search, KSC-BC-2020-06/F00251, 16 April 2021, Confidential, paras 15-16.
[34] Other courts have previously found that an inventory is unnecessary where the relevant information was available to the Defence by other means, including upon request or through the Prosecution's discharge of its disclosure obligations. *See, for example,* ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-241, Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, 12 November 2008, paras 6 (requesting a complete inventory

15. Finally, proof or a record of chain of custody is not a condition for the admission of evidence. As the Trial Panel in the *Gucati and Haradinaj* case noted:

> [t]he existence, specificity and reliability of such a record, if it exists, are factors of potential relevance to evaluating the conditions of admissibility of the collected evidence. The Panel also notes that there is no international consensus or standard regarding the manner and form in which a record of chain of custody must be made. The admissibility of collected evidence would only be affected if the purported shortcomings of the chain of custody would raise questions about the authenticity and/or reliability of that evidence. In any event, the reliability and authenticity of evidence collected in a seizure operation must always be assessed in light of all relevant circumstances and not merely on the basis of the formal record that was made, if any, of the seizure operation.[35]

16. Other similarly situated courts have likewise concluded that the absence of an inventory, in and of itself, is not a reason to exclude seized evidence,[36] noting that, where appropriate and in addition to an inventory, there are other means of establishing the provenance, chain of custody, and/or authenticity of seized evidence.[37]

17. Thus, the interpretation of Rule 39(4) advanced in the Appeal could not materially impact the ultimate assessment of whether any of the specific items admitted into evidence in the Decision should have been excluded under Rule 138(2).

18. Accordingly, as the Defence has failed to meet its burden and the Appeal is in any event unfounded, it should be dismissed.

III. CLASSIFICATION

19. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

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of all materials seized), 10 (considering that metadata fields accompanying disclosure identify the seized materials), 11-12 (considering that the Defence has the ability to inspect materials, including originals).

[35] *Gucati and Haradinaj* Judgment, para.28.

[36] ICTY, *Prosectuor v. Stakić*, IT-97-24-T, Decision on Defence Request to Exclude Evidence as Inadmissible, 31 July 2002, p.3. *See also* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, paras 18-19.

[37] *See, for example, Delalić* Decision, paras 24-31.

IV. RELIEF REQUESTED

20. For the foregoing reasons, the Panel should deny the Appeal in its entirety.

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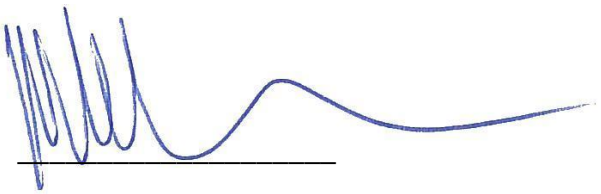

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Monday, 7 August 2023

At The Hague, the Netherlands